

THE
CASE

The Most Noble DOUGLAS Duke of
HAMILTON and BRANDON, touching the
Peerage of BRANDON.

IN the Year 1603, James the Sixth, King of Scotland, acceded to the Crown of England. His Majesty, soon after, created several of his Scotch Subjects PEERS OF ENGLAND; and particularly, the Duke of Lenox, who was the King's nearest Relation on the Father's Side, was, in the Year 1613, created a Peer of England by the Title of Earl of Richmond.

James, Marquis of Hamilton (who was the King's nearest Relation on the Side of his Mother, Mary Queen of Scots), was, in the Year 1619, created a Peer of England, by the Title of Earl of Cambridge; by which Title his Son, James Duke of Hamilton, was, during the Civil Wars in the Year 1649, arraigned, tried and condemned for High Treason. This English Peerage was next enjoyed by his Brother, William Duke of Hamilton; but, upon the Death of William without Issue Male, the Title and Peerage of Cambridge became extinct, and the Dukedom and Peerage of Hamilton devolved upon his Niece Ann Duchess of Hamilton, the Daughter of the said James Duke of Hamilton and Earl of Cambridge.

King Charles the First created the Earl of Elgin a Peer of England, by the Title of Lord Bruce.

King Charles the Second created another Earl of Elgin an English Earl, by the Title of Earl of Aylesbury; and created the Duke of Lauderdale Earl of Guildford.

King James the Second created John Lord Churchill of Aymouth in Scotland, Lord Churchill of Sandridge in England, who was afterwards created Duke of Marlborough.

Queen Anne, a little Time before the Union, created John Duke of Argyll Earl of Greenwich.

Thus, during a Period of more than 100 Years, from the Union of the Two Crowns to the Union of the Two Kingdoms, Peers of Scotland had been created Peers of England, and as such had sat and voted in Parliament without Interruption.

In like Manner, divers English Subjects, Baronets and others, were created PEERS OF SCOTLAND by King James the First, King Charles the First, and King Charles the Second; and several of those Peerages are still enjoyed by their Descendants, with all their attendant Privileges.

By the Fourth Article of the Treaty of the Union, ratified, approved, and confirmed by the Act of the Fifth of Queen Anne, Chap. VIII. intituled, *An Act for the Union of the Two Kingdoms of England and Scotland*, it is declared, That from and after the Union, there shall be a Communication of all Rights, Privileges and Advantages which do or may belong to the Subjects of either Kingdom, except where it is otherwise expressly agreed in these Articles.

The Twenty-second Article of the Treaty is as follows: "That by virtue of this Treaty of the Peers of Scotland at the Time of the Union, Sixteen shall be the Number to sit and vote in the House of Lords;" and then it goes on and prescribes the Mode of electing them.

The Twenty-third Article directs, That the aforesaid Sixteen Peers of Scotland, who are to sit in the House of Lords of the Parliament of Great Britain, shall have all Privileges of Parliament which the Peers of England now have, and which they or any Peers of Great Britain shall have after the Union, and particularly the Right of sitting upon the Trials of Peers; and in case of the Trial of any Peer in Time of Adjournment or Prorogation of Parliament, the Sixteen Peers shall be summoned in the same Manner, and have the same Powers and Privileges at such Trial as any other Peers of Great Britain: And that in case any Trials of Peers shall hereafter happen when there is no Parliament in being, the Sixteen Peers of Scotland, who sat in the last preceding Parliament, shall be summoned in the same Manner, and have the same Powers and Privileges at such Trials as any other Peers of Great Britain: And that all Peers of Scotland, and their Successors to their Honours and Dignities, shall, from and after the Union, be Peers of Great Britain, and have Rank and Precedency next and immediately after the Peers of like Orders and Degrees in England at the Time of the Union, and before all Peers of Great Britain of the like Orders and Degrees who may be created after the Union; and shall be tried as Peers of Great Britain; and shall enjoy all Privileges of Peers, as fully as the Peers of England do now enjoy the same, or as they or any other Peers of Great Britain may hereafter enjoy the same, except the Right and Privilege of sitting in the House of Lords, and the Privileges depending thereon, and particularly the Right of sitting upon the Trials of Peers.

The Union of the Two Kingdoms commenced the 1st of May 1707; and the then Parliament of Great Britain being dissolved in the Beginning of the Year 1708, a Proclamation was issued the 26th of April 1708, for electing the Sixteen Peers of Scotland returnable the 1st of July.

Her late Majesty Queen Anne was pleased, by Letters Patent under the Great Seal of Great Britain, dated the 26th of May 1708, to grant to James then Duke of Queensberry the Honour, Style, Title and Dignity of Baron of Rippon and Marquis of Beverley in the County of York, and Duke of Dover in the County of Kent, to him during his Life, and after his Death to his Second Son the late Duke, by the Name of Charles Earl of Solway, and his Heirs Male; and in Pursuance thereof a Writ was issued to summon the said Duke to Parliament.

The Duke of Queensberry soon after went to Scotland, to be present at the Election of the Sixteen Scotch Peers, the 17th of June 1708; and his Grace attempted to vote at that Election as a Scotch Peer, and as Proxy for the Earl of Delorain; but this was much opposed, and a Protestation was made against it.

After the Parliament met, viz. the 19th of November 1708, the said James Duke of Queensberry was, as Duke of Dover, introduced in his Robes to the House of Peers, took his Seat as usual in such Cases, took the Oaths, and no Objection was made to him.

Some

1603.

1619.

May 1, 1707.
The Union of the Two
Kingdoms.

May 26, 1708.
The Duke of Queens-
berry created Duke of
Dover.

November 19, 1708.
Took his Seat in the
House of Peers as Duke
of Dover.

Some of the *Scottish* Peers thinking an Injury was done to them by the Return made of the Sixteen Peers to serve in Parliament, and apprehending themselves duly elected by a Majority of good Votes, petitioned the House of Peers, complaining of that undue Return of the Sixteen Peers. One of the material Objections insisted upon by the petitioning Peers against the Sitting Peers was, That the Election had been carried for the Sitting Peers, by the Vote of the Duke of *Queensberry* and *Dover*; whereas *he being a Peer of Britain as Duke of Dover*, could not vote either in his own Right, or as Proxy for another; and this Matter coming to be considered by the House of Lords the 18th of *January* 1708, they agreed to hear Counsel upon the following Question, *viz.*

Whether a Peer of *Scotland*, claiming to sit in the House of Peers by virtue of a Patent passed under the Great Seal of *Great Britain* after the Union, and who now sits in the Parliament of *Great Britain*, had a Right to vote in the Election of the Sixteen Peers, who are to represent the Peers of *Scotland* in Parliament?

Counsel of both Sides were heard the 21st of the said Month of *January*, and their Lordships came to the following Resolution, *viz.*

It is resolved and declared, by the Lords Spiritual and Temporal in Parliament assembled, That a Peer of *Scotland*, claiming to sit in the House of Peers, by virtue of a Patent passed under the Great Seal of *Great Britain* after the Union, and who now sits in the Parliament of *Great Britain*, had no Right to vote in the Election of the Sixteen Peers who are to represent the Peers of *Scotland* in Parliament.

The next Day, their Lordships came likewise to the following Resolution:

It is resolved and declared, by the Lords Spiritual and Temporal in Parliament assembled, That a Peer of *Scotland*, who had not a Right to vote at the Election of the Sixteen Peers for *Scotland*, had not a Right to give a Vote, as Proxy, in the Election of the Sixteen Peers who are to represent the Peers of *Scotland* in Parliament.

The Duke of *Queensberry's* Vote at the Election of *Scottish* Peers rejected, because he was a Peer of *Great Britain*.

In pursuance of these Resolutions, the Votes of the Duke of *Queensberry*, in his own Right, and as Proxy, in the Election of the Peers of *Scotland*, were rejected; and as a Consequence, the Marquis of *Lothian* was removed from his Seat in the House of Peers, to which he had an undeniable Title, if the Duke of *Queensberry's* Patent, as Duke of *Dover*, had not given him a Title to sit and vote in the House of Peers; and upon the same Ground the Marquis of *Annandale* was admitted to a Seat in the said House.

He continued to sit and vote as Duke of *Dover* in the House of Peers during Two Parliaments, and till his Death.

September 10, 1711. The Duke of *Hamilton* created Duke of *Brandon*.

James Duke of *Queensberry*, as Duke of *Dover*, sat and voted in Two several Parliaments, till his Grace died; nor was any Objection ever made, or any Resolution taken in the House of Peers against him.

In the Year 1711, Queen *Anne* was pleased, by Letters Patent under the Great Seal of *Great Britain*, dated the 10th Day of *September*, in the Tenth Year of her Reign, to create *James*, then Duke of *Hamilton* (the eldest Son of *Anne*, Duchess of *Hamilton*, who was the Daughter of the said *James* Duke of *Hamilton* and Earl of *Cambridge*, who had suffered in the Year 1649), Baron of *Dutton* in the County Palatine of *Chester*, and Duke of *Brandon* in the County of *Suffolk*, and the Heirs Male of his Body, with a Limitation to the Heirs Male of the Bodies of *William* and *Anne*, late Duke and Duchess of *Hamilton*.

Extracts from the Journals of the House of Lords, 12th December, 1711.

of Lords in consequence of the Duke of *Hamilton's* being created a British Peer.

Notice being given, that in the List of the Nobility, delivered by *Garter* King at Arms the 7th Instant, there is inserted, *James* *Hamilton*, Duke of *Hamilton* and *Brandon*, amongst the Dukes; and the House being informed that a Patent is lately passed the Great Seal for creating the said Duke of *Hamilton* Duke of *Brandon*, and a Debate arising thereupon,

It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That on the 20th Day of this Instant *December*, this House will take the said Patent in Consideration; and that *Basil Herne*, Esq. the Riding Six Clerk for the last Year, or his Deputy, do then lay the Privy Seal Bill of the said Patent before this House, and all the Lords summoned to attend.

18th December, 1711.

The House being this Day moved, That his Grace the Duke of *Hamilton* may be heard, by his Counsel, on *Thursday* next, in relation to the Patent for creating him Duke of *Brandon*,

It is ordered, by the Lords Spiritual and Temporal, in Parliament assembled, That the Duke of *Hamilton* shall be heard, by his Counsel, as desired, on *Thursday* next at Twelve o'Clock, before this House takes into Consideration the said Patent.

Ordered, That all the Judges do attend this House on *Thursday* next at Twelve o'Clock.

20th December, 1711.

The Officer attending (according to Order), with the Privy Seal Bill of the Patent for creating the Duke of *Hamilton* Duke of *Brandon*, he was called in, and delivered at the Bar the said Privy Seal Bill, with a Copy of the Inrollment thereof.

The Counsel on behalf of the Duke of *Hamilton* were called in, and the Copy of the Inrollment of the said Patent was read.

The Counsel were heard, and withdrew.

And after Debate, and reading some Proceedings out of the Journal in the Duke of *Dover's* Case, the Question following was proposed to be put to the Judges, *viz.*

Whether the Queen be disabled, by the Act of Union, to grant a Peerage of *Great Britain*, with all the Privileges depending thereon, to any Person who was a Peer of *Scotland* before the Union?

Which being objected to, and a Debate arising thereupon,

This Question was stated, That the Judges do now deliver their Opinions to this House upon the said proposed Question.

After further Debate, the previous Question was put, Whether this Question shall be now put? It was resolved in the Negative.

Then it being proposed, That no Patent of Honour granted to any Peer of *Great Britain*, who was a Peer of *Scotland* at the Time of the Union, can intitle such Peer to sit and vote in Parliament, or to sit upon the Trial of Peers,

And Debate thereupon,

The Question was put, That no Patent of Honour granted to any Peer of *Great Britain*, who was a Peer of *Scotland* at the Time of the Union, can intitle such Peer to sit and vote in Parliament, or to sit upon the Trial of Peers.

It was resolved in the Affirmative.

Dissentient.

Buckingham P. 1. Because, as we apprehend, by this Resolution, the Prerogative of the Crown in granting Patents of Honour, with all Privileges depending thereon, to the Peers of *Great Britain* who were Peers

of

December 20, 1711. Protest of the Dissident Peers against the Resolution which excluded the Duke of *Brandon* from his Seat and Vote in the House of Peers.



of Scotland at the Time of the Union, as well as the Right of the Duke of Brandon to sit and vote in Parliament, are taken away. And this Prerogative of the Crown, and Right of the Duke, depending upon the Construction of an Act of Parliament, though Counsel, by Order of the House, were heard at the Bar, and all the Judges were ordered to attend at the same Time, yet the Opinion of the Judges was not permitted to be asked touching the Construction of the said Act of Parliament.

2. Because the Prerogative of the Crown, as we conceive, in granting Patents of Honour, with the Privileges depending thereon, ought not, on the Construction of an Act of Parliament, to be taken away, unless there be plain and express Words to that Purpose in the said Act; and we conceive there are no such plain and express Words for that Purpose in the Act of Union.

3. Because by this Resolution all the Peers of Great Britain who were Peers of Scotland at the Time of the Union, are supposed to be incapable of receiving any Patent of Honour from the Crown, by virtue whereof they may be intitled to the Privilege of sitting and voting in Parliament, and sitting on the Trial of Peers; which, we conceive, is repugnant to the Fourth Article of the Act of Union, which declares the Privileges, that there shall be a Communication of all Rights, Privileges, and Advantages, which do or may belong to the Subjects of either Kingdom, except where it is otherwise expressly agreed in those Articles, in which, we apprehend, there is no such Provision.

4. Because the Duke of Queensberry, in all Respects in the same Case as the Duke of Hamilton, was introduced, sat, and voted in this House, in Matters of the highest Importance, in Two several Parliaments, as Duke of Dover, by virtue of a Patent passed since the Union; and in consequence of such sitting and voting, his Vote in the Election of the Peers of Scotland was rejected; and, as a further Consequence thereof, the Marquis of Lothian was removed from his Seat in this House, which he had an undeniable Title to if the Duke of Queensberry's Patent as Duke of Dover had not given him a Title to sit and vote in this House.

5. Because by this Resolution the Peers of Scotland are reduced to a worse Condition, in some Respects, than the meanest or most criminal Subject.

6. Because we conceive this Resolution may be construed to be a Violation of the Treaty between the Two Kingdoms.

Winchelsea,	Rivers,	Mar,	Loudon,	Balmerino,
Hunsden,	Ormonde,	Blantyre,	Paulett,	Roseberrie,
Home,	Orkney,	Osborne,	Killybegs,	Oxford and Mortimer.
Harcourt, C. S.	Ilay,	Boyle,	Clarendon,	

Upon the 2d of January 1711-12, George Lord Duplin, eldest Son and Heir Apparent of the Earl of Kinross, a Peer of Scotland, being created, by Letters Patent of the 31st December preceding, Baron Hay of Pedwarden, was introduced, presented his Patent, and took his Seat without Objection.

In the Year 1719, Charles, then Duke of Queensberry and Dover, petitioned his Majesty for a Writ of Summons to Parliament as Duke of Dover, claiming by Virtue of a Limitation in the Patent to him under his then Title of Earl of Solway; his Majesty being pleased to refer the Petition to the House of Peers, it was, upon the 14th of January 1719-20, resolved, that the Duke of Dover had not a Right to a Writ of Summons to Parliament.

Upon the 19th of January 1726, David, eldest Son of the Duke of Montrose, having been created Earl of Graham, by Letters Patent dated the 23d of May 1722, was introduced. Upon reading the Patent, and the Writ of Summons, the Proceedings in the Case of the Duke of Hamilton, created Duke of Brandon, as entered in the Journal of the 12th December, were also read; and a Motion being made to appoint a Day to take the Patent into Consideration, the same was laid aside by the previous Question, and the Earl (who upon the Debate had withdrawn) was thereupon called in and admitted to take his Seat in the usual Form.

The Effect of a Patent of Honour granted to the eldest Son and Heir Apparent of a Peer of Scotland hath never since been questioned, though there have been various Instances of such Creations. Nor have the Proceedings of the House of Lords, in the Case of the Duke of Hamilton, been ever brought again under the Consideration of the House.

The present Duke of Hamilton and Brandon, Great-grandson of the said James Duke of Hamilton who was created Duke of Brandon in 1711, most humbly conceives that the above stated Resolution of the House of Peers of the 20th of December 1711, by the express Words of it, extending only to the Case of Scotch Peers at the Time of the Union, who at a later Period were created English Peers, does not affect him, the Peerages of Hamilton and Brandon having descended upon him at one and the same Instant of Time.

The Words of the Resolution of the 20th of December 1711 import no more, than that a Peer of Great Britain, who was a Peer of Scotland at the Time of the Union, is not himself capable of exercising the Rights incident to a Patent of Honour. But the Issue Male of such Person, who must be Peers of Great Britain, and cannot possibly be Peers of Scotland, in the Sense of the Resolution, are not subject to the same Disability; for the Descent of a Scotch Honour creates no Incapacity to take by Descent a British Peerage; nor does it extinguish any Right vested by prior Creation. An Alien born, naturalized or made a Denizen, a Subject who does not conform to the established Religion, may, if the Sovereign pleases, be created Peers. They are both disabled by Law from sitting and voting in Parliament, or from sitting upon a Trial of a Peer. But the Patent, when it gives an Estate of Inheritance, vests a Right transmissible to the Issue; who, if they are not subject to the like Disabilities, may enjoy every Privilege incident to that Right, and would be intitled to a Writ of Summons to Parliament.

The Duke of Dover's Case does not affect the Duke of Hamilton, the Duke of Dover having been created, before the Union, Earl of Solway in Scotland; which Honour, though granted during his Infancy, it was held he could not wave, and the Title of Dover was claimed by him, not by Descent, but by Purchase.

In the Proceedings upon the Case of the Title of Brandon, the Prerogative of the Queen to grant the Title of Brandon was not permitted by the House of Peers to be brought into Question, nor was it maintained that the Patent was void: When therefore the Right under that Patent descends to a Person under no supposed Disability, the Duke of Hamilton humbly insists he is intitled to all the Benefits of it.

The Duke of Hamilton begs also to lay considerable Stress upon the uniform Tenor of Authorities admitting Heirs Apparent of Scotch Titles, created Peers of Great Britain since the Union, to a Seat amongst your Lordships after the Descent of their Scotch Titles upon them: Because he is not able to discover any Arguments applicable to the Construction of the Act, which can distinguish their Claim from his own; but he conceives that the Claims of such Persons, and that which he now maintains, are both materially distinguishable from the

the Case of a Peer of Scotland before the Union, created an English Peer after it, upon whose personal Incapacity only your Lordships have twice decided.

The Duke of Hamilton further begs leave to observe to your Lordships, how difficult it is to entertain a Conception, that the Act which united the two Kingdoms, and was founded in Compact between them, disabled not only those who were then Peers of Scotland, but also their Descendants, from enjoying a Right of the highest Honour and Importance for any Subject of Great Britain to attain, and which the Peers of Scotland had enjoyed for a Century and upwards.

The Duke of Hamilton is advised, that when a Doubt arises between two Constructions, one of which destroys an antecedent Right, and the other preserves it, the Rule of Law rejects the former and adopts the latter. He therefore presumes to hope, that a Construction of the Act of Union, favourable to his Claim, will be adopted by your Lordships in Preference to one that militates against it, if there is even a Doubt between them; because if the Act of Union can disable him to sit and vote as an English Peer, it certainly derogates from one of the most inherent Rights of the Crown of these Realms, and imposes the most humiliating Disability upon one Class of Subjects.

But the Duke of Hamilton by no means admits any Doubt of Construction, whether a British Peer claiming by Descent, though from an Ancestor so created since the Union, who was also a Peer of Scotland at the Time of the Union, can sit and vote in the Parliament of Great Britain: The Act of Union conveying no such Disability in express Terms, or by natural Inference.

The Duke of Hamilton conceives the sound, and the natural Construction to be, That Sixteen elected Scotch Peers are to sit and vote in the Parliament of Great Britain by virtue of that Election, merely as Representatives of the Peerage of Scotland; and that all other Scotch Peers are, in that Character alone, to enjoy every Right incidental to an English Peerage before the Union, except that of sitting and voting in the Parliament of Great Britain. This Construction takes away no Right, and results naturally from the Words, not affecting, in any Degree, the Capacity of Scotch Peers who might receive, in future, Patents of Peerage under the Great Seal of Great Britain, to sit and vote as such in the Parliament of Great Britain.

The just and true Meaning of the Act in Question may be further collected from the Construction put upon it by the Crown, as well as by the Subject, soon after the Act passed, and affirmed by the Peers. Her Majesty Queen Anne almost immediately asserted the Right in dispute; the Subject also asserted it, and the Peers allowed it. The Assent, therefore, of the Sovereign, as well as that of the Peers, must have been given in the Dark to this Part of the Act, if it can extinguish a Right of such Importance. For, in a Month after the Act passed, the Queen conferred upon a Peer of Scotland a British Peerage, with all its Rights. The Peers received him, he sat and voted in two Parliaments, without any Imputation upon his Right; and the Peers, in his Case, emphatically adopted the Distinction which the Duke of Hamilton has urged in this Address to your Lordships; namely, That a Peer of Scotland, sitting in the House of Peers by virtue of a Patent under the Great Seal of Great Britain, is not considered as a Peer of Scotland in that House, or distinguished from any other Peer of Great Britain.

AR. MACDONALD.
J. DUNNING.
GEORGE HARDINGE.

THE
Moff Noble DOUGLAS Duke of
HAMILTON and BRANDON, touching the
Peerage of BRANDON.



1782

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O.F.

Hamilton & Brandon v. Douglas
The Duke of Hamilton and Brandon, touching the Peerage of Brandon.